Office-Supreme Court, U.S.
FILED
MAY 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1766

IN THE

# Supreme Court of the United States

October Term, 1980

COLUMBUS AND SOUTHERN OHIO ELECTRIC COMPANY,
*Appellant,*
vs.
THE PUBLIC UTILITIES COMMISSION OF OHIO,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF OHIO

## BRIEF OF THE CINCINNATI GAS & ELECTRIC COMPANY, CLEVELAND ELECTRIC ILLUMINATING COMPANY, THE DAYTON POWER AND LIGHT COMPANY, OHIO EDISON COMPANY, OHIO POWER COMPANY, AND TOLEDO EDISON COMPANY AS AMICI CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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## INTEREST OF AMICI[1]

The Cincinnati Gas & Electric Company, Cleveland Electric Illuminating Company, The Dayton Power and Light Company, Ohio Edison Company, Ohio Power Company, and Toledo Edison Company are all investor-owned

[1] Written consents of the parties to the filing of this brief have been filed with the Clerk pursuant to the requirements of Rule 36.1.

public utilities which provide electric service to customers in the State of Ohio, and which are regulated by the Appellee Public Utilities Commission of Ohio (hereinafter "the Commission"). In addition to electric service, Cincinnati Gas & Electric, Dayton Power and Light, and Toledo Edison also supply natural gas to Ohio customers. Amici appear in this case to urge the Court to note probable jurisdiction, and to overturn the judgment of the Supreme Court of Ohio which is on appeal herein.

Like the Appellant, Columbus and Southern Ohio Electric Company (hereinafter "C&SOE" or "Columbus and Southern"), these amici generate the electricity which they supply to their customers primarily by large coal-fired boilers[2], and are therefore highly dependent upon reliable and continuous supplies of coal. The 1977-78 coal strike interrupted these supplies, and consequently created a critical electric supply emergency in Ohio during the most severe winter in one hundred years.

In response to this emergency, the Commission entered an order on February 14, 1978, which applied to all electric utilities in Ohio. App. A92. Under that order, utilities were directed to "arrest the decline of remaining fuel supply" by

> (a) Load dispatch on company owned generation to those units with more secure supply;
>
> (b) Purchase of energy through the interconnected network from other utilities.
>
> App. A93

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[2] As of January 1, 1978, amici owned a total generating capacity of 25,640,762 kilowatts. Approximately 70% of this total capacity was coal-fired. Amici Cleveland Electric Illuminating and Toledo Edison are also the joint owners of a 906,000 kilowatt nuclear facility, Davis-Besse Unit 1, which was in partial service during the coal strike.

Unlike Appellant, however, Cincinnati Gas & Electric, Cleveland Electric Illuminating, and Dayton Power and Light continued to receive coal at some of their plants, and were able to meet the Commission's directive by load dispatch to these plants, therefore minimizing the need to make large purchases of power through the interconnected system.[3] Cleveland Electric Illuminating and Toledo Edison were also able to avoid large purchases of power by dispatching load to their Davis-Besse nuclear plant. Ohio Power, a subsidiary of American Electric Power Company (AEP), avoided substantial purchased power expenses by energy transfers from other AEP subsidiaries. Ohio Edison however, was not so fortunate. Like Columbus and Southern, Edison's plants are located in areas were there was extensive UMWA activity during the strike, and coal shipments to these plants were virtually shut off. As a consequence, Ohio Edison was compelled to purchase large amounts of expensive emergency energy through the interconnected network.[4]

Under the rule announced in this case, amici face the real possibility that the Commission can compel the taking of shareholder funds to pay for extraordinary measures to preserve undiminished service during future emergencies, without just compensation. Consequently, amici, who

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[3] Cincinnati Gas & Electric, Cleveland Electric Illuminating, and Dayton Power and Light own plants which were outside the area of the most severe UMWA activity, and were therefore able to receive sporadic coal shipments at these plants.

[4] The Commission denied Ohio Edison's request to recover purchased power costs which had not been recovered through its fuel adjustment clause. *In the Matter of the Emergency of the Electrical Energy Supply Within the State of Ohio.* Case No. 78-106-EL-UNC (Entry, March 17, 1978). Thereafter, Ohio Edison again sought recovery of these costs in a general rate case, and the Commission again denied the request. *Re Ohio Edison Co.*, Case No. 77-1249-EL-AIR (Opinion and Order, November 17, 1978).

were affected in some way by the Commission's orders entered during the coal strike and because of the prospective impact of the Ohio Supreme Court's decision, have a vital interest in this Court's disposition of this appeal.

## SUMMARY OF ARGUMENT

Given this country's recent history of energy supply emergencies, amici submit that it is likely that they and other utilities will face similar supply emergencies in the future. Under the rule announced by the Ohio Supreme Court in this case, amici are faced with the prospect of being ordered by the Public Utilities Commission of Ohio to take extraordinarily expensive measures to preserve undiminished service in such future emergencies, without any right to compensation therefor. The orders of the Commission, affirmed by the judgment on review in this case, accomplished the complete destruction of a valuable property right of a public utility in order to confer on the public the benefit of undiminished service during an emergency. In affirming the Commission's denial of just compensation for this taking of utility property, the judgment of the Ohio Supreme Court is contrary to the Fifth Amendment, and must therefore be reversed.

## ARGUMENT

The rule of constitutional law announced by the Ohio Supreme Court in this case has implications which go far beyond the impact of an unique historical event on a single electric utility. For if the Constitution is held to permit a governmental authority to compel a public utility to expend large amounts of shareholder funds in undertaking extraordinary measures to preserve undiminished service during an energy emergency, without full compensation therefor, these amici and other utilities face the prospect

of catastrophic financial losses in the event of future energy supply emergencies.

The prospect of such emergencies occurring in the future is not imaginary, if recent history is a reliable indicator of future events. For example, east coast electric utilities faced an electrical supply emergency during 1973, when the Arab oil embargo sharply restricted fuel supplies to their oil-fired generating facilities. Gas utilities experienced repeated supply emergencies throughout the 1970s, due to shortages of natural gas. The 1978 UMWA coal strike severly impaired the generating capacity of a large number of eastern and midwest utilities, and the current UMWA strike, which, at the time of writing has lasted nearly two months, threatens to create similar problems if it endures much longer.

In the event that similar energy supply emergencies occur in the future, according to the Ohio Supreme Court, the Public Utilities Commission of Ohio may order any electric utility to purchase unlimited amounts of expensive emergency power in order to preserve undiminished service to customers, and can deny the utility the right to be fully and fairly compensated for the expense. This rule cannot withstand constitutional scrutiny, and must be reversed.

The Constitution does not invalidate police power regulation which incidentally reduces the value of a utility's property, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944), but regulation can nonetheless become so onerous as to constitute a taking of property for which the Constitution requires full compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). While it is often difficult to determine whether this constitutional line of demarcation has been crossed in a particular case, *see, e.g., Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), it is clear that the Ohio Supreme

Court has strayed across that line here. There is no question that the Commission's orders in this case affected a valuable property right of C&SOE, nor that the Commission's action amounted to a complete deprivation of that right. In this respect, the Commission's action was the legal and practical equivalent of the appropriation of a $6 million asset of the utility.

There is also no question that C&SOE was denied full and fair compensation for this compelled taking of its property. Although the Ohio Supreme Court's opinion appears to assume that C&SOE's rates are adequate to compensate it for the extraordinary emergency service obligation which the Court found to be imposed by Ohio Revised Code Section 4905.22, this is plainly not the case. Columbus and Southern's general rates, as are those of any public utility, are fixed by the Commission at a level which is expected to be sufficient to meet the utility's expenses of operation during a "typical" period. Those general rates are *not* designed to adequately compensate a utility which is compelled to incur extraordinary expenses during emergency conditions. *See City of Pittsburgh v. Pennsylvania Pub. Util. Comm.*, 42 Pa. Commw. Ct. 242, 400 A.2d 672, 674 (1979). Therefore, there is no basis for any claim that C&SOE has been somehow fully compensated for this extraordinary expenditure.

Finally, there is no question that the purpose and effect of the Commission's compelled taking of C&SOE's property was to confer a benefit on the general public in C&SOE's service area. In essence, the Commission decided to place an extraordinary burden on the utility's shareholders rather than to permit the utility's customers to suffer the consequences of the strike-induced energy emergency. It is precisely such attempts to obtain public benefits at the expense of private property interests for

which the Fifth Amendment requires just compensation. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

## CONCLUSION

As Mr. Justice Holmes observed in *Pennsylvania Coal*, "the question at bottom" in this case "is upon whom the loss . . . should fall." 260 U.S. at 416. Amici submit that the Supreme Court of Ohio has unconstitutionally allocated the burden of compelled emergency power purchases to utility shareholders, when that burden should have fallen on the consumers who benefited from the Commission's order. Unless the judgment of the Ohio Supreme Court is reversed, these amici and their shareholders face the real threat of similar unconstitutional deprivation in future energy supply emergencies. Accordingly, we urge the Court to note probable jurisdiction in this case, and to overturn the judgment of the Supreme Court of Ohio.

Respectfully submitted,

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